Smokey Mountain
47.7
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How prove A Will Was Never probated? Step 1: Was it recorded?

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SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee, Eastern Section.
Gerald T. WALCZAK d/b/a B & W Oil Company, Inc. Plaintiff-Appellant
v.
Larry C. GALLOWAY and wife Glenda Galloway Defendants-Appellants
v.
PLATEAU PROPERTIES, INC., Trustee Intervenor-Appellant

Sept. 11, 1986.

Alfred Adams, Jr., of Nashville for plaintiff.

Joe E. Magill of Clinton for defendants.

George H. Buxton, Jr., of Oak Ridge for Intervenor.

OPINION

GODDARD, J.

*1 In this suit contesting the ownership of mineral interests in two tracts containing 65 and 20 acres, respectively, both Gerald T. Walczak, d/b/a B & W Oil Company, Inc., Plaintiff, and Larry C. Galloway and wife Glenda Galloway, Defendants, appeal the judgment entered by the Chancellor. Intervenor, Plateau Properties, Inc., Trustee, also appeals.

The Chancellor held the following: (1) that it was necessary for Plateau (our use of Plateau also includes its lessee Walczak) to deraign its title as to the mineral rights back to the State of Tennessee, which it had not done, (2) that certain instruments in Plateau's chain of title were fatally defective, (3) that Plateau was entitled to rely upon T.C.A. 28-2-109 [FN1] relative to payment of taxes to create a rebuttable presumption of their ownership, (4) that the Galloways were unable to rebut this presumption, (5) that the Galloways' title to the surface was superior to that of Plateau to the minerals and that Plateau was not entitled to encroach upon the surface for the purpose of extracting its mineral interests. [FN2]

As already noted, both parties have appealed. Plateau insists that the Trial Court was in error in requiring deraignment of its title to the minerals to the State of Tennessee and should have determined that deraignment of title to a common source was sufficient to establish its interest in the minerals. It also contends that having determined that it had established title pursuant to 28-2-109 the Chancellor was in error in precluding its right to extract the minerals. The Defendants appeal insisting that the Court erred in overruling their motion to dismiss and in holding that the Plaintiff had title to the minerals by virtue of T.C.A. 28-2-109.

As the issues are framed by the pleadings, we believe the appropriate approach to this case would be first to require Plateau show title to the mineral interests, and upon such a showing it was incumbent upon the Galloways to show a superior title by conveyance or adverse possession, or failing that, to show that title was not held by Plateau.

Applying this approach to the record before us, we note the deed to Plateau from Crosby Harrison and others, conveyed mineral interests as to 122.7 acres of which the Galloways' 65 and 20-acre tracts are a part.

The record also discloses that the mineral interests as to the 20 acres was specifically reserved in all deeds in the Galloways' chain of title from 1912 forward, including the deed to them from Archie R. and Maggie Lavender, dated May 13, 1971. As to the 65-acre tract, the mineral interest was reserved in two earlier conveyances in the Galloways' chain, specifically Harriman Land Company to N.A. Williams, dated February 6, 1912, and N.A. Williams to J.C. Lavender, dated April 19, 1919. [FN3] Thereafter, however, there was no reservation as to these interests. See appendix

for chain of title as to both tracts from 1912 forward.

Notwithstanding the failure to reserve the mineral interests as to the 65-acre tract, it is clear as to both tracts the Galloways did not acquire title to mineral interests.

***2** This conclusion brings us to the next question: Did the Galloways acquire an interest in the minerals by adverse possession? In addressing this question the Trial Court made the following finding and conclusion of law, with which we concur:

The defendants, Galloway, contend that they have established title to the mineral rights underneath the surface of their property by adverse possession. The Galloways testified that they have lived on the subject property for 14 years, and that at one time in 1983, they attempted to lease the oil and gas underneath their property to a producer who then discovered the claim of Plateau Properties in and to the oil and gas underneath the defendants' surface. The defendants quite honestly admit that they have never used or appropriated any of the minerals from this property, but they have been in possession only of the surface which has been used apparently for residential and agricultural purposes during the time which they and their predecessors in title have owned it. Defense counsel argues that the defendants have established title to the minerals by adverse possession and has cited to the Court several decisions from other jurisdictions in support of his claim for adverse possession. However, the Appellate Courts in Tennessee have held contrary to the defendants' position regarding adverse possession. The Tennessee Courts have held that adverse possession of the surface is not adverse possession of the minerals or oil and gas underneath the surface and does not defeat the separate interests in such subsurface minerals. In the case of *Murray vs. Alred,* 43 S.W. 355, 100 Tenn. 100 (1897), the Court found that possession of the surface owner is not adverse to the owners of the minerals, where the surface is used merely for agricultural purposes, without any denial of the right to the minerals or any assertion of a claim inconsistent therewith. In *Layne vs. Baggenstoss,* 640 S.W.2d 1, the Court held:

It is clear that conveyances of rights of interest in minerals creates a separate and distinct estate or corporeal hereditament and one seeking to vest title in himself through adverse possession must establish the elements of the mineral estate separate from the surface. Plaintiffs here have failed to show adverse possession. They have merely possessed the surface.

Every presumption is in favor of the true owner and the burden of proving adverse possession is upon the party pleading and relying upon it.

The Tennessee Supreme Court in the case of *Northcutt vs. Church,* 188 S.W. 220, 135 Tenn. 541 (1915), said:

The surface owner setting up the statute must establish a possession of the mine, as such, independently of the surface. Such a possession must be actual, notorious, exclusive, peaceable, and hostile for the statutory period. And in these respects the surface owner is no better than a stranger. 135 Tenn. p. 554.

See, also, Summers, *Oil and Gas,* Vol. 1A, § 138.

It is clear from the Tennessee decisions that some actual mining, drilling or other appropriation of the minerals themselves is essential under Tennessee law in order to make out a claim for adverse possession. Apparently, the Courts in some of the other states have taken a different view. But the law in the State of Tennessee as it presently stands does not permit mere possession of the surface to constitute adverse possession of the minerals lying thereunder.

***3** Our next concern is to determine whether the prima facie title shown by Plateau in the deed above noted has been impeached by the proof. In this regard the Chancellor felt that the burden of proof rested with Plateau to show a perfect title, beginning with the State of Tennessee, or a common source which the Trial Court construed to mean in the context of the facts of this case a source relating to the mineral interests only. While we concur with the Trial Court that Plateau had the burden of initially showing title to the mineral interest, upon doing so the burden to show otherwise was upon the Galloways, and it is our view they have failed to carry it.

Plateau showed Title

Gal. with Evid to Rebut

It is true that, as found by the Chancellor, a 150-acre tract coming out of the 200-acre original grant is not described by metes and bounds. The deed, however, does recite the following:

and being the same land conveyed on the 14 day of April 1899 by the said Land Company to Peter T. Oson fully described in the decree entered Journal "F" page 330 Jany 19th 1898.

In the absence of proof that the instrument referred to in Journal F is defective, we are not in a position to so find.

The Trial Court also found fault with two other instruments in Plateau's chain of title. First, he found that recording of the will of G.E. Harrison was insufficient in the absence of showing that it had been admitted to probate and proven to be the deceased's last will and testament. In our view of the case, it was incumbent upon the Galloways to show that the will was never probated and, hence, ineffective to transfer title. Moreover, even had Mr. Harrison died intestate, it is apparent from other instruments in the record that his widow and all of his children executed deeds which would have effectively transferred his interest.

The other instrument questioned by the Trial Court is a deed by a Special Master in bankruptcy in a proceedings in the Southern Division of the Eastern District of Tennessee. The Trial Court was of the opinion that he perhaps improperly allowed exhibit 27, a copy of the court order in the bankruptcy proceeding, as well as certain supporting documents in the evidence. He was of this opinion because he had concluded the order was incomplete and did "not bear an original certification from the clerk of the court."

As to the Trial Court's first concern, we believe the deed from the Special Master (exhibit 23), which recites it was made pursuant to an order of the Court, raises a presumption that the antecedent proceedings were regular. *McCartney v. Gamble, et al.*, 184 Tenn. 243, 198 S.W.2d 552 (1946); *Tiffany v. Shipley*, 25 Tenn.App. 539, 161 S.W.2d 373 (1941). Again the burden rested with the Galloways to show the contrary. As to the second point, the record discloses that the attorney for the Galloways specifically stated in response to a question by the Court that he did not question the authenticity of the exhibit.

We therefore find that Plateau and its lessee are entitled to exercise the mineral rights as to the property in question. We have reluctantly reached this conclusion insofar as the 65-acre tract is concerned because the last reservation in the chain of title was in a deed recorded in 1923, more than 50 years before the Galloways' purchase. We do not have this reluctance as to the 20-acre tract because the Galloways' deed clearly reserves such rights. It does seem appropriate, however, to remand the case, and in the event the parties cannot agree as to the manner of Plateau utilizing its rights, to permit the Court to enter an order in regard thereto so that as little damage as possible may be done to the Galloways' property.

***4** In conclusion, we do not believe it necessary to address the issue raised as to T.C.A. 28-2-109 in light of our resolution of the other issues raised.

For the foregoing reason the case is modified and remanded for such further proceedings consistent with this opinion. Costs of appeal, as are costs below, are adjudged against the Galloways.

FN1. *28-2-109. Presumption of ownership from payment of taxes.*--Any person holding any real estate or land of any kind, or any legal or equitable interest therein, who has paid, or who and those through whom he claims have paid, the state and county taxes on the same for more than twenty (20) years continuously prior to the date when any question arises in any of the courts of this state concerning the same, and who has had or who and those through whom he claims have had, his deed, conveyance, grant or other assurance of title recorded in the register's office of the county in which the land lies, for said period of more than twenty (20) years, shall be presumed prima facie to be the legal owner of said land.

FN2. The Trial Court recognized that Plateau's

victory was a Pyrrhic one, but suggested that it perhaps could condemn a right-of-way by necessity, reach an amicable agreement, or obtain the gas and oil and other minerals from wells or deep mines on adjacent property.

FN3. This deed was not recorded until October 1923.

END OF DOCUMENT